



October 4, 2009

The Honorable Peter DeVries, Council Chair  
Washington State Building Code Council  
128 10<sup>th</sup> Avenue SW  
PO Box 42525  
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Dear Chairman DeVries,

It is with regret that NEMA is compelled to contact you to voice our deep concern regarding a serious breach of procedure during the Energy Code Technical Advisory Group (TAG) hearing of June 26, 2009. At issue is the reversal of a legitimately disposed of proposal (09-139), that was subsequently reopened and overturned by what we believe to be a most inappropriate action.

If allowed to stand, this action will undermine the very integrity and trust in the code adoption process. We respectfully request, in the strongest possible voice, that this action be overturned and vacated, and that the Council reject Proposal 09-139 to Section 505.1 of the WSEC and respect the overwhelming consensus on this issue reached on April 17, 2009.

In support of this request, we offer the following facts and evidence:

- The published agenda for the April 17, 2009 meeting was to dispense of the residential and non-residential lighting proposals. Many stakeholders from the lighting design community attended this meeting in person. The lighting manufacturers were represented by NEMA's Western Field Representative who participated via teleconference. This assembly represented the most knowledgeable and experienced lighting professionals in the state. The level of industry participation is evidence that the legislative mandate and intent of public inclusion and representation was met.
- The proposal in question generated the most discussion of any heard that day, consuming over two hours on this single issue. All interested parties were offered sufficient time and leeway to fully explain all sides of the issue.
- Following the discussion of this proposal, a vote was taken, and the result was to approve the proposal as modified. The final vote was overwhelming in favor of the motion as modified. While the discussion was admittedly controversial and emotional, the overwhelming consensus of the industry stakeholders, the experts in this field and those

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most affected by the decision, makes the final decision non-controversial. It was in fact a very lopsided vote.

- There were no objections to the voting process or the result of the vote following this action, either during this meeting or for the two months of regular meetings following this action.
- On June 26, at the last scheduled Energy Code TAG meeting, at the very end of the day, with but a relative handful of participants still in attendance, the submitter of Proposal 139 asked to reopen discussion on that item. The proposer is not an appointed member of the TAG and does not have the right under the rules to make motions.
- At this meeting, the primary TAG Chair turned the meeting over to her alternate. It is important to note that the alternate had attended a relatively few meetings and did not have the benefit of the complete history of this series of hearings.
- As the proponent asked to reopen discussion, it was stated that the rules require consent of at least one person who voted with the majority to agree to reopen discussion. Not a single person at that point agreed to reopen discussion. There were voiced objections to reopening this proposal.
- It was then stated that there is precedence to reopen a previous action at the discretion of the Chair. While this is in fact true, those instances were to address previously unnoticed problems such as unintended consequences, close loopholes, clarify intent, or to evaluate new information relevant to the proposal. Those actions were taken with the full consent of all in attendance and the lack of objection signified agreement.
- None of the preceding needs were identified as reason to reopen the item in question. The only reason this was requested to be reheard was because the proponent did not like the original disposition of the proposal. Reopening a proposal for this reason is without precedent, in this or any code hearing, and places in jeopardy any action previously voted on in good faith with the full participation of the industry.
- With no expectation or notification that this very important issue could possibly be reopened for discussion, there were no subject matter experts from the lighting design community in attendance. The proponent did not even request a modification to the agenda at the beginning of the meeting regarding this item.
- With no stakeholder participation from the most knowledgeable and most impacted segment of the industry, the discussion was very abbreviated and, in a matter of approximately ten minutes, the previous two hours of discussion involving all stakeholders was rendered worthless, as was the overwhelming vote representing the clear needs and preference of the industry that was properly taken on April 17..

We are further concerned that both our request dated July 1, 2009, and that of the International Association of Lighting Designers that was filed with the Council following the July 9, 2009 meeting and within the 10-day statutory timeframe, were not responded to in a timely manner. WAC 51-04-040 sets forth requirements for reconsideration of Council actions, and the Council's responsibility upon receiving such a request. Certainly either or both of the letters to the Council referenced above could only be considered as requests for reconsideration, filed in a timely manner, and containing specific reasons why the Council should reconsider its action on this

proposal. We believe the Council is in violation of this rule since no response was received, and in fact the Council took no action within the stipulated 60 calendar days following receipt of these requests.

NEMA has participated in code development for decades at the local, national and international level. We recognize that at times the process is adversarial in nature and at such times, one party will be disappointed in the outcome. NEMA and its individual members have always abided by the decisions reached through the established process, even when we have disagreed with the decision. We are concerned that the Washington Energy Code Revision process, a process in which we have invested significant time and effort, can be subverted by an action that apparently violates both the letter and intent of the legislature.

Allowing the action in question to stand will cause the stakeholders who participated in these proceedings, many of which are small Washington businesses, to reconsider investing time, effort, and money in a process that can be summarily altered without due process and without full participatory representation. The potential long term damage to the quality and validity of the process can not be overstated.

All of the following substantiate the necessity for a careful review of this issue, and the very process by which it was allowed to be moved forward by the Council:

- The intent that the purpose of the TAG is to achieve consensus,
- The intent and desire for full participation by the stakeholders affected by any action or recommendation,
- Article III of the Council bylaws regarding Technical Advisory Groups, Section 1.5 that calls for disputed recommendations to be presented to the Standing Committees in the form of an issue paper, outlining all issues related to the subject,
- the legislative intent for rulemaking to be transparent and inclusive of all interested parties, and
- the improper and inappropriate action on June 26, 2009 regarding Proposal 139 that overturned a legitimate vote. Consensus could only be achieved at the April 17 meeting with industry representatives in attendance and participating. There was no possibility of consensus on this issue at the June 26 Energy Code TAG meeting.

We respectfully restate our formal request that the action of June 26, 2009 be dismissed, and that the decision of April 17, 2009 on Proposal 139 be forwarded by the Building Code Council as the legitimate recommendation of the TAG and the industry. The very integrity of the process, now and in the future, rides on this decision.

Please feel free to contact me should you desire to discuss this important issue further. We await your timely decision on this request.

Sincerely,

Joe Andre  
NEMA Western Field Representative